NO. 366

In the Supreme Court of the United States

OCTOBER TERM, 1948

FRED W. FINK, *Petitioner*

v.

[redacted] STEAMSHIP COMPANY

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

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MEMORANDUM FOR THE RESPONDENT

During World War II the United States, upon the organization of the War Shipping Administration in February 1942, took over the direct physical operation of the government-owned merchant fleet. It terminated the various forms of bareboat charters and operating agency agreements under which the Maritime Commission had previously demised government vessels for private operation by bareboat charterers and operating agents who as owners *pro hac vice* in possession and control,

manned, navigated and physically managed the vessels as their own. It replaced this peacetime method of operating government-owned vessels by direct government operation, employing three distinct and independent types of agents among whom it distributed the various duties. To man, navigate and physically manage the vessels, the War Shipping Administration employed experienced ship masters, officers and crews who were subject to its exclusive control and were technically unclassified civil service employees of the United States. To manage and conduct the procurement and loading of cargo and to render other berth and port services to its vessels, it employed shipping operators having existing berthing and stevedoring facilities whom it designated as berth agents. To manage and conduct the accounting and certain other shoreside business of the vessels, it employed other experienced shipping operators as ships' husbands or general agents, but excluded them from any authority or control whatever over the physical operation of its vessels and the civil-service masters, officers and crews through whom the Government manned, navigated, managed and operated its vessels.

A small number of third parties, such as seamen, longshoremen, ship repairmen and passengers, who have been injured as a result of negligence of the Government's masters and crews in the navigation and management of its vessels, have brought suit against various government agents instead of

suing the United States as their disclosed principal. The question of whether such shoreside business agents are liable to these third parties for the independent negligence of the Government's employees in operating the vessels has been twice before this Court, with varying results. *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707; *Caldarola* v. *Eckert*, 332 U. S. 155. In the *Hust* case it was held that the agents might be deemed operating agents or owners *pro hac vice* in possession and control and were liable as such. In the *Caldarola* case it was held that the agents were not owners *pro hac vice* or operating agents in possession and control so as to be, for all practical purposes, liable as owners of the vessels.

The decision of the court below presents the question whether a civil service employee of the United States serving as a seaman on such a government-owned and operated vessel has his sole remedy under the Jones Act (41 Stat. 1007; 46 U.S.C. 688), for injuries resulting from the negligence of the government-employed master and crew of the vessel, by suit in admiralty against the United States pursuant to the Suits in Admiralty Act (41 Stat. 525; 46 U.S.C. 741 *et seq.*), or whether he may, at his election, also recover by a suit at law, against the ships' husband or general agent which acted for its disclosed principal, the United States, only in respect of certain shoreside business operations of the vessel, but had no authority or control

over the work of the seaman or the operation of the vessel and which neither caused the injuries nor owed any duty whatever to prevent them. The court below held that in the instant case the government-employed seaman had no such right of election.

The court below conceived the question as involving two issues: (1) Whether this Court's decision in *Caldarola* v. *Eckert*, 332 U. S. 155, 159, that the Government's agent was not in possession and control of the vessel as owner *pro hac vice* or operating agent, modified its previous holding in the *Hust* case that as operating agent or owner *pro hac vice* in possession and control the agent was liable for the negligence of the master and crew; and (2) whether this Court's decision in the *Hust* case, that the War Shipping Administration (Clarification) Act of March 24, 1943 (57 Stat. 45; 50 U.S.C. App. 1291) gave civil service employees of the United States serving on War Shipping Administration operated vessels a right of election to sue agents of the Government on causes of action arising prior to its enactment, applied equally to causes of action, like the present, arising after the effective date of the Act. The court below decided that the *Caldarola* decision had not modified the *Hust* case, but that, on the other hand, the *Hust* case indicated that the Clarification Act, far from giving such a right of election in cases after its effective date, made suit against the United States petitioner's exclusive remedy.

1. The holding of the court below, that this Court's decision in *Caldarola* v. *Eckert*, 332 U. S. 155, 159, did not modify the *Hust* case, is in conflict with the holding of the Court of Appeals for the Third Circuit in *Gaynor* v. *Agwilines*, 169 F. 2d 612, 618, now pending on petition for a writ of certiorari, No. 162 Misc., this Term. The *Caldarola* case recognizes that *Hust* established the right of the seaman to bring the statutory action under the Jones Act against the Government's agent; but, as the dissenters in *Caldarola* pointed out, the reasoning in the *Caldarola* case follows that of the dissent in *Hust*, in holding that the agent is not liable as owner *pro hac vice* or operating agent of the vessel.

Since the *Caldarola* decision establishes that the Government's shoreside business agents are not owners *pro hac vice* or operating agents, the court below plainly erred in refusing to apply this Court's decisions in *Denton* v. *Yazoo & M. V. R. R. Co.*, 284 U. S. 305, 308-309, and *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, 584-585. Under settled principles, recognized in those cases, the vicarious liability of the ships' husband or shoreside business agent of the Government was confined to the torts of persons doing its shoreside work, and did not extend to the negligence of the Government's masters and crews who were doing work of the United States in the physical management and operation of its vessels which was not subject to the shoreside agent's supervision or control. The ships'

husband or shoreside business agent of a private principal under the same form of agreement would not be held liable, and no reported case indicates even an attempt to impose the liability of an operating agent or owner *pro hac vice* on the husbanding agent of a private shipping operator. It goes without saying that, even if a husbanding agent may, because of his activities in procuring seamen for employment by his principal, be deemed their "employer" as regards the institution of a Jones Act suit (see 332 U. S. at 159), still the seamen's work is not the agent's as it must be to impose vicarious liability on the agent under such statutes. Cf. *Chicago, R. I. & P. Ry. Co.* v. *Norman,* 165 Okla. 133.

2. Despite the contrary holding of the Court of Appeals for the Second Circuit in *McAllister* v. *Cosmopolitan Shipping Co.,* 169 F. 2d 4, 8 (now pending on petition for a writ of certiorari, No. 351, this Term), we believe that the court below held correctly that in a case like the present, arising after the effective date of the Clarification Act, petitioner does not have the election to enforce his Jones Act rights either against the United States or the agent which this Court held was available to Hust under the retroactive provision of the Act: *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707, 728-730.

The *Hust* case involved injuries occurring before the passage of the Clarification Act. The

opinion explicitly left open the question as to the effect of the Clarification Act upon injuries occurring after its enactment (328 U. S. 727, 732), which is the question we have here. Absent the right of election conferred by the retroactive clause, it is obvious that petitioner, a civil service employee of the United States, has no right to recover from the Government's shoreside business agent for the negligence of the Government's master and crew in doing work of the United States in respect of which the agent had no authority or control. Indeed, Congress in the Clarification Act declared its purpose in no uncertain terms to grant government seamen the power to enforce these rights only through the Suits in Admiralty Act. Congress intended that for the future the rights of government seamen were to be measured by those of seamen privately employed rather than by those of other government employees, but the enforcement of these rights was necessarily restricted to suits against their employer, the United States. Had Congress regarded the Government's civil service seamen as employees of the Government's agents, the Clarification Act would have been superfluous. In the language of the court below, "It would have been wholly unnecessary to accord to seamen in private employment the rights of seamen in private employment" (R. 28).

While we believe that the final result reached by the court below is correct, its error in respect of

the interpretation and application of this Court's decisions in *Caldarola* v. *Eckert*, 332 U. S. 155, 159, and *Denton* v. *Yazoo & M. V. R. R. Co.*, 284 U. S. 305, 308-309, and its conflict with the decisions in the *Gaynor* and *McAllister* cases (No. 162 Misc. and No. 351, this Term), are such as to render appropriate review by this Court. For these reasons, we do not oppose the granting of the writ of certiorari in this case.

PHILIP B. PERLMAN,
Solicitor General.

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